

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

IYARI O.,

Claimant,

OAH No. 2010040614

and

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on March 17, 2011.

R. G., claimant Iyari O.'s mother, represented claimant, who was present.¹ Spanish language interpretation services were provided to claimant's mother.

Johanna Arias-Bhatia, Fair Hearing/Government Affairs Manager, represented South Central Los Angeles Regional Center (service agency or SCLARC).

Testimonial and documentary evidence was received, the case argued and the matter submitted for decision on April 8, 2011.² The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

¹ Initials identify claimant and her representative to preserve confidentiality.

² The record was held open until April 8, 2011 for submissions consistent with the Post-Hearing Orders in *Iyari O. vs. South Central Los Angeles Regional Center*, No. 2010040614 (March 21, 2011). On March 30, 2011, the Office of Administrative Hearings (OAH) received by facsimile transmission Examination and Progress Reports from Cecelia Essin, M.D. and a copy of a March 22, 2011 prescription, all of which are collectively marked for identification and received in

ISSUE

Whether the service agency should continue to fund swimming lessons provided to claimant through YMCA Southeast (YMCA).

FACTUAL FINDINGS

1. Claimant is a 10-year-old consumer of SCLARC due to her qualifying diagnoses of mental retardation and cerebral palsy. Claimant also has a diagnosis of Expressive Language Disorder. She is non-verbal with limited communication skills and she presents severe delays in all developmental domains. Claimant uses a wheelchair for mobility. She resides with her mother and her younger sibling in the Los Angeles Unified School District (LAUSD) where she is enrolled in a special education program.

2. By Notice of Proposed Action, dated February 24, 2010, the service agency notified claimant that it “will no longer be able to continue funding for the following service(s): YMCA Southeast.” As authority for its action, the service agency cited the language in Welfare and Institutions Code section 4648.5, subdivisions (a), as set forth in Legal Conclusion 4, and highlighted in bold certain portions of subdivision (a) (2), (a)(4), and (b).

3. Claimant filed a Fair Hearing Request on March 19, 2010. Thereafter, these proceedings ensued.

4. Marssia Chutan, claimant’s service coordinator, testified that SCLARC had been funding claimant’s swimming services in accordance with the decision in *I.O. vs. South Central Los Angeles Regional Center*, No. 2009070270 (November 2, 2009). The Administrative Law Judge in that decision found that Welfare and Institutions Code section 4648.5 was inapplicable to the service agency’s prior attempted termination of claimant’s swimming services since that statutory provision was not the basis for the proposed termination.

5. Ms. Chutan testified that swimming services are not listed among the services and supports³ enumerated in claimant’s most recent individual program plan (IPP), dated December 2, 2010, because claimant has not been receiving those

evidence as Exhibit C. On April 7, 2011, OAH received the service agency’s written response attaching reports from its physical therapy consultant Alireza Hoveyda, its consulting physician Dwight Lee, M.D., and its community services department, all of which are collectively marked for identification and received in evidence as Exhibit 8.

³ The service agency funds 24 hours per month of in-home respite for claimant. Claimant receives 39.5 hours per month of In-Home Supportive Services.

services pending administrative appeal. The frequency at which claimant received swimming services in the past was not established.

6. Saul Lopez, Ms. Chutan's supervising program manager, testified that the service agency funded claimant's swimming services "as a purely recreational program." Mr. Lopez testified also that the service agency conducted no evaluation to determine whether swimming was therapeutically beneficial for claimant.

7. Claimant's mother understands that claimant's swimming was funded for social recreational purposes, but asserts that swimming "strengthened [claimant's] whole body, especially her back." Claimant's mother testified that "before swimming [claimant] didn't have any ability she now has." Claimant's "spine was deviating to one side," but "it stopped with swimming. There is no further deviation." Claimant's mother testified that a January 2011 X-ray of claimant's spine indicates that her "spine is going to one side again." According to claimant's mother's testimony, "water benefitted [claimant's] whole body. When she swam she walked much longer; she did not use her wheel chair. Since November 2010, she is walking less. She is missing strength from her legs. With swimming she walked the whole day. Now she cannot."

8. Claimant's mother additionally testified that "the water has helped [claimant] to relax. Since October 2010, after claimant stopped swimming, she became aggressive. She hurts herself. Her hands are completely bitten."

9. Patricia Miramontes has known claimant and her mother over five years. Ms. Miramontes testified that when she first met claimant she was able to walk. Then, "she had surgery on her legs, and stopped walking. But, her mother took her to swimming and she [began] to have strength in her legs. We were surprised." Ms. Miramontes testified that "up to December [claimant] walks very little because she is missing strength; she gets tired and no longer wants to walk. She starts biting herself. She gets desperate. She has the desire, but not the strength." Ms. Miramontes testified that "the difference is that before water therapy helped a lot."

10. Dr. Cecelia D. Essin, a developmental-behavioral pediatrician treating claimant, in a March 21, 2011 Evaluation and Progress Report, states that "[g]iven the demonstrated positive social and behavioral effects of the previous recreational swimming/aquatic program and the negative changes noted in [claimant's] . . . behavior since the program was discontinued, access to continued or similar swimming/aquatic activities is strongly recommended for this cognitively impaired young adolescent."

11. In response to Dr. Essin's recommendation, Alireza Hoveyda, the service agency's consulting physical therapist, presented a review of her own understanding of studies on Aquatic Physical Therapy interventions, expressed her view that "studies have been inconclusive regarding the effectiveness of Aquatic

Physical Therapy on the motor skills of children with neuromotor disorders[,]” and recommended that claimant obtain swimming services from other sources, including California Children’s Services and LAUSD. It is internally contradictory to recommend swimming services for claimant while simultaneously minimizing the effectiveness of such services. No weight is accorded Ms. Hoveyda’s opinion.

12. In response to Dr. Essin’s recommendation, Dr. Dwight Lee, the service agency’s consulting physician, offered an April 5, 2011 report devoid of any medical opinion and it is therefore not considered.

13. Although funded for social recreational purposes, swimming lessons are a critical means for ameliorating the physical, cognitive and psychosocial effects of claimant’s developmental disabilities.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (the Lanterman Act), developmentally disabled persons in California have a statutory right to treatment and habilitation services and supports at state expense. (Welf. & Inst. Code, §§ 4502, 4620, 4646-4648; *Association for Retarded Citizens—California v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.)

2. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community.” (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing IPPs for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

3. The services and supports to be funded for a consumer are determined through the IPP process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as “specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (Welf. & Inst. Code, § 4512, subd. (b).)

4. Section 4648.5 of the Lanterman Act, which was enacted to address a budgetary imbalance in the California 2009-2010 fiscal year, provides as follows:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' [*sic*] authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the cost of providing the following services:

(1) Camping services and associated travel expenses.

(2) Social recreation activities, except for those activities vendored as community-based day programs.

(3) Educational services for children three to 17, inclusive, years of age.

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means of ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

5. As the party seeking a modification of an existing service or support, the service agency bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code, § 500.)⁴

⁴ Evidence Code section 500 provides that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

6. Claimant bears the burden of establishing her extraordinary circumstances that would warrant an exemption from the state's budget spending reductions. (Evid. Code, § 500.) Claimant has met that burden.

7. A preponderance of evidence establishes that swimming lessons were critical for strengthening claimant's legs. As set forth in Factual Findings 7 and 9, with swimming lessons claimant achieved a modicum of unrestricted mobility. Claimant was able to walk for extended periods of time. Without swimming lessons her legs are weakened and her movements limited. The service agency offered no credible rebuttal evidence.

8. Under the Lanterman Act, claimant has a right to treatment and habilitation services that are a primary or critical means of ameliorating the physical effects of her cerebral palsy. The preponderance of evidence establishes that swimming lessons is such a service. Cause exists pursuant to section 4648.5, subdivision (c), for the service agency to continue funding swimming lessons for claimant.

ORDER

1. Claimant Iyari O.'s appeal is granted.
2. South Central Los Angeles Regional Center shall continue funding claimant Iyari O.'s swimming lessons at the YMCA Southeast.

Dated: May 2, 2011

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE:

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.